and so, the mere shipment of the specified amount of liquor for any purpose, unlawful, made it a proper case for the operation of the Federal Act. In view of the diverse decisions upon the state statutes, it is submitted that both cases are correct and that the true construction of the Webb-Kenyon Act has been consistently applied.

From the decisions of the cases it would seem that the construction of this statute has been uniform, though it has been of no effect in some cases where it has been sought to be invoked, due to the state laws. The United States Supreme Court in the Kentucky case has settled the matter in accord with the other cases and so its future activity and effectiveness must depend upon the state laws upon such points as the legality of possessing liquor for one's personal use.

LIABILITY FOR REFUSAL TO SELL GOODS AS AFFECTED BY THE CLAYTON ACT.—A review of the decisions relating to this subject reveals no little confusion, which is no doubt due to the fact that Congress is still passing new laws on the subject and that this branch of the law is still in a period of development. The scope of this note is limited to a discussion of two types of so-called price fixing or discrimination, and their legality or illegality as respects the Sherman Anti-Trust Act [1] and the recent Clayton Act [2] which was passed in order to supplement the earlier Sherman Act on the subject of Trusts and Monopolies.

At common law a single manufacturer might sell his goods to whomsoever he pleased and had an inherent right to refuse business, particularly when not dealing in a necessity of life or rendering a public or quasi-public service.[3] But it is unlawful at common law for a combination of dealers to refuse to sell to those who will not maintain certain prices for the resale of the goods and a right of action is given to the party injured by such refusal.[4] And a like distinction between individual and combined action prevails in the majority of cases on the subject under the modern anti-trust laws. As was said in one case, "One may do in fixing and enforcing prices, and in exacting tribute from the people and in restraining interstate commerce, what two or more cannot do in pursuance of an agreement or combination." [5]

In the recent case of *Great Atlantic & Pacific Tea Co.* v. *Cream*

---

[1] Act July 2, 1890, c. 647, 26 Stat. 209.

[2] Act Oct. 15, 1914, c. 321, 38 Stat. 730.

[3] See O'Halloram *v.* American Sea Green State Co., 207 Fed. 187, 190, 191, where it is said, "Each and every individual or corporation engaged in the production of an article, may, of course, fix the terms on which he will sell, provided he violates no law in so doing * * * but when all, or substantially, producers and dealers combine to fix prices and control sales, as well as production, the interests of the public are at once threatened and necessarily injured."

[4] Brown *v.* Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 126.

[5] Ray, District Judge, Bobbs-Merrill Co. *v.* Straus, 139 Fed. 155, 191.

of Wheat Co., 224 Fed. 566, the question of the refusal of a manufacturer to sell to a retailer who failed to maintain a certain retail price was brought squarely before the Federal Court. The business of the defendant is the manufacture and sale of a food product known as "Cream of Wheat." It is manufactured from what are called "middlings," which are nothing more than coarse flour and fine bran obtainable by anyone, and over the supply of which the defendant has no control. Furthermore, the product is not manufactured by a secret process and the only monopoly it has is in its trade name. The defendant refused to sell its product to the plaintiff, who operated a chain of retail stores and who refused to maintain a certain retail price of so much a package. The plaintiff applied for an injunction to restrain the defendant from further refusal of sale, a relief which is provided for in section 16 of the Clayton Act,[6] but the injunction was denied.

The Clayton Act, Section 2, in effect provides that it shall be unlawful for any person engaged in interstate commerce to discriminate in price, either directly or indirectly, between different purchasers of commodities when the effect is to substantially lessen competition or tend to create a monopoly. But the Act further provides "that nothing herein contained shall prevent a person engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

It can be seen that if it were not for the clause which provides that the effect of such discrimination must be to substantially lessen competition or tend to create a monopoly in order to make it unlawful, and also for the proviso that the act does not prohibit one from "choosing his own customers in bona fide transactions and not in restraint of trade" it would be unlawful for any one dealing in interstate commerce, whether it be a single business concern or a combination of many and regardless of effect, to discriminate in price or refuse to sell its products to those who wish to buy.

But these two clauses make it clear that the defendant did not violate the act if his refusal did not substantially lessen competition or tend to create a monopoly, and was "in a bona fide transaction and not in restraint of trade." And while the Clayton Act has not witnessed the long period of court construction that the Sherman Act has, it seems, in view of the circumstances, the nature of the article, and the authority on the question, both at common law and under the *Anti-Trust Laws* that the defendant's refusal was not in unreasonable restraint of trade.

While there is a dearth of authority directly in point the question may with profit be looked upon in the light of the common law and the decisions under the more or less similar Sherman Act. The refusal to sell certain goods, except when a part of a monopolistic plan in violation of the Sherman Act, has been al-

[6] *Supra.*

lowed by the Federal Courts.[7] In one of these cases a certain tobacco company refused to sell to jobbers in New York, but sold only to the retail trade, and it was held that such a refusal was not in violation of the Sherman Act.[8] In another case it was held that the refusal of a manufacturer to sell to dealers who failed to abide by certain rules as regards prices, and the handling of competitors' goods, except at such prices as made it impossible for the dealer to make a profit, was not a violation of the Sherman Act.[9] And it was said by Sanborn, Circuit Judge, "The right of each competitor to fix prices of the commodities which he offers for sale and to dictate the terms upon which he will dispose of them is indispensable to the very existence of competition; strike down or stipulate away that right, and competition is not only restricted but destroyed."[10] But, in giving these cases the consideration which is due them, it must be borne in mind that they were decided before the passage of the Clayton Act, which supplements the Sherman Act. Hence their force is much diminished. However, it seems clear that the refusal to sell specially desired goods, has been qualifiedly permitted by Section 2 of the Clayton Act, which authorizes one "to select his own customers in bona fide transactions and not in restraint of trade."

In deciding cases under statutes of this nature, the legislative instrument, Anti-Trust Acts, should be given a reasonable construction. To quote from Peckham, J.,[11] "The act must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce and possibly to restrain it."[12] But it is urged, as a matter of public policy, that within the purview of the Act it is necessary to protect isolated, legitimate concerns from the chain and department stores who cut prices on standard goods merely for advertising purposes.

A very different method of protecting the manufacturer from the cutting prices by dealers and jobbers, and one which has been more strongly condemned by the courts, arose in the recent case of *United States* v. *Kellogg Toasted Corn Flakes Co.*, 222 Fed. 275. The question which arose was whether or not the manufacturer, in connection with the absolute sale of its product (and the patented package containing it) to a jobber, may lawfully con-

---

[7] Virtue Creamery Package Co. *v.* United States, 179 Fed. 115, affirmed, 227 U. S. 8; Whitwell *v.* Continental Tobacco Co., 60 C. C. A. 290, 125 Fed. 454, 64 L. R. A. 689; Locker *v.* American Tobacco Co., 218 Fed. 447; Re Greene, 52 Fed. 104.

[8] Locker *v.* American Tobacco Co., *supra*.

[9] Whitwell *v.* Continental Tobacco Co., *supra*.

[10] See Whitwell *v.* Continental Tobacco Co., *supra*. But see also Clayton Act, *supra*, § 2.

[11] Hopkins *v.* United States, 171 U. S. 578, 600.

[12] This statement was requoted by White, C. J., in United States *v.* American Tobacco Co., 221 U. S. 106; The Standard Oil Co. *v.* United States, 221 U. S. 1.

trol the price at which the complete package shall be resold by the jobber, or by retailers who buy from the jobber. The case was decided in connection with the Sherman Anti-Trust Act and the court held that the manufacturer could not thus, by binding contract, control the price without violating the act.

It will be readily seen that the question here differs widely from that which arose in the Cream of Wheat case, because in that case the manufacturer did not attempt to control the price by a binding contract, but merely refused to sell to those who refused to maintain the desired retail price. The legal effect in the two cases is very different, although it seems that if both practices were permitted the end attained by the manufacturer might in some cases be similar.

The conclusion reached in the Corn Flakes case was eminently sound. The general rule is well settled that such a system of contracts, whereby the manufacturer fixes prices and eliminates competition, are invalid at common law and so far as they affect interstate commerce under the Sherman Act.[13] And such agreements are not excepted from the rule because the article to which they have reference is manufactured under a secret process.[14] Moreover, the copyright act does not give the right to fix the price at which future sales by the vendee should be made.[15] And if the transfer of a patented article is complete an attempt to fix the price at which it is to be sold is of no avail.[16]

It therefore appears from a view of the authorities and a consideration of the two recent cases[17] that a single manufacturer, when not combining with others, may refuse under proper circumstances to sell to those dealers who will not maintain a certain retail price, but that the manufacturer cannot lawfully and by binding contract force a dealer to whom he has sold goods to maintain a designated retail price.

APPLICATION OF PAYMENTS BY THE CREDITOR IN THE ABSENCE OF ANY DIRECTION BY THE DEBTOR.—It is a general rule that where a debtor owing on several demands to the same person, makes a payment without directing its application, the creditor may apply it to that obligation which he may elect.[1] Though the

[13] Dr. Miles Medical Co. *v.* Park & Sons, 220 U. S. 373, 400; John D. Park & Sons Co. *v.* Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. 135.

[14] Dr. Miles Medical Co. *v.* Park & Sons, ***supra***. John D. Park & Sons Co. *v.* Hartman, ***supra***.

[15] Straus *v.* American Pub. Ass., 231 U. S. 222, 231, L. R. A. 1915A 1099, Ann. Cas. 1915A 369.

[16] Bauer *v.* O'Donnell, 229 U. S. 1, 50 L. R. A. (N. S.) 1185. See 1 VA. LAW REV. 445.

[17] Great Atlantic & Pacific Tea Co. *v.* Cream of Wheat Co., ***supra;*** United States *v.* Kellogg Toasted Corn Flakes Co., ***supra***.

[1] Brewer *v.* Knapp, 1 Pick. 332; Washington Bank *v.* Prescott, 20 Pick. 339.